INDEX

CITATIONS

Cases:	Page
Berkovitz v. *Arbib & Houlberg, Inc.*, 230 N. Y. 261, 130 N. E. 288	13
Cowell Portland Cement Co., Matter of, 40 N. L. R. B. 652	3
DeFour v. *United States*, 260 Fed. 596, certiorari denied, 253 U. S. 487	8
Dolcater v. *Manufacturers & Traders Trust Co.*, 25 F. Supp. 637	13
Eagle-Picher Mining & Smelting Co., Matter of, 16 N. L. R. B. 727	3
Eagle Picher Mining & Smelting Co. v. *National Labor Relations Board*, 119 F. (2d) 903	3
Edgmon v. *United States*, 87 F. (2d) 13	8
Goublin v. *United States*, 261 Fed. 5	8
Great Northern Ry. Co. v. *United States*, 208 U. S. 452	8
Hawkinson v. *Carnell & Bradburn*, 26 F. Supp. 150	13
Hertz v. *Woodman*, 218 U. S. 205	8
Lang v. *United States*, 133 Fed. 201	8
Maceo v. *United States*, 46 F. (2d) 788	8
National Labor Relations Board v. *Austin Co.*, 21 L. R. R. M. 2132	11
National Labor Relations Board v. *Cowell Portland Cement Co.*, 148 F. (2d) 237, certiorari denied, 326 U. S. 735	3
National Labor Relations Board v. *Falk Corp.*, 308 U. S. 453	3, 10
National Labor Relations Board v. *Keystone Steel & Wire Co.*, No. 9, this Term	6, 14
National Labor Relations Board v. *National Garment Co.*, decided January 7, 1948	9
National Labor Relations Board v. *National Motor Bearing Co.*, 105 F. (2d) 652	3
National Labor Relations Board v. *Newport News Shipbuilding & Dry Dock Co.*, 308 U. S. 241	10
National Labor Relations Board v. *Southern Bell Telephone and Telegraph Co.*, 319 U. S. 50	3
National Motor Bearing Co., Matter of, 5 N. L. R. B. 409	3
Patterson's Estate, In re, 155 Cal. 626, 102 Pac. 941	13
Salt Lake Coffee & Spice Co. v. *District Court*, 44 Utah 411, 140 Pac. 666	13
Sprague v. *Ticonic National Bank*, 307 U. S. 161	13
Tinker v. *Van Dyke*, Fed. Cas. No. 14,058	8
United States v. *Auerbach*, 68 F. Supp. 776	8

Cases—Continued — Page

United States v. *Chicago, St. P., M. & O. Ry. Co.*, 151 Fed. 84, affirmed, 162 Fed. 835, certiorari denied, 212 U. S. 579 — 8

United States v. *Four Cases of Lastings*, Fed. Cas. No. 15,145 — 8

United States v. *Krupnick*, 51 F. Supp. 982 — 8

United States v. *Reisinger*, 128 U. S. 398 — 8

United States v. *U. S. Industrial Alcohol Co.*, 8 F. Supp. 179 — 8

Warren v. *Garber*, Fed. Cas. No. 17,196 — 8

Woodvine v. *Dean*, 194 Mass. 40, 79 N. E. 882 — 13

Statutes:

Federal Savings Statute, 1 U. S. C. 29 — 8

National Labor Relations Act (Act of July 5, 1935, c. 372, 49 Stat. 449, 29 U. S. C. 151, *et seq.*):

Section 9 (c) — 2

Section 10 (c) — 2

Section 10 (e) — 10

Section 10 (f) — 10

Labor Management Relations Act of 1947 (Public Law 101, 80th Cong., 1st Sess., Chap. 120) — 1, 7, 12

Miscellaneous:

Cong. Rec., June 5, 1947, p. 6601 — 5

93 Cong. Rec. pp. 4030, 4196, 4283 — 5, 6

H. Rep. No. 510, 80th Cong. 1st Sess., pp. 54–55 — 3

Federal Rules of Civil Procedure, 28 U. S. C. 723c, Rule 86 — 13

S. Rep. No. 105, on S. 1126, 80th Cong., 1st Sess., pp. 3, 12–13, 27, 56 — 3, 4, 11

2 Sutherland, *Statutory Construction*, § 2212 (3d ed. 1943) — 13

In the Supreme Court of the United States

OCTOBER TERM, 1947

No. 19

NEPTUNE METER COMPANY, PETITIONER

v.

NATIONAL LABOR RELATIONS BOARD

No. 20

NEPTUNE METER COMPANY, PETITIONER

v.

NATIONAL LABOR RELATIONS BOARD

ON PETITIONS FOR WRITS OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE SECOND CIRCUIT

SUPPLEMENTAL MEMORANDUM OF THE NATIONAL LABOR RELATIONS BOARD

Petitioner, Neptune Meter Company, hereinafter called the Company, has filed a supplemental brief in support of its petitions for certiorari in Nos. 19 and 20, October Term, 1947, formerly Nos. 905 and 906, October Term, 1946. This supplemental brief is based on the enactment, after the petitions were filed, of the Labor Management Relations Act of 1947 (Public Law 101,

80th Cong., 1st Sess., Ch. 120) amending the National Labor Relations Act.

1. The Company urges (Supp. Br. 2–5) that these cases be remanded to the Board for further proceedings not inconsistent with the provisions of the Labor Management Relations Act. This request is based upon the argument that the Board's orders involved here requiring the Company to disestablish completely the two labor organizations found by the Board to be company-dominated and supported would neither be issued by the Board nor enforced by a reviewing court today because of an amendment to Section 10 (c) of the National Labor Relations Act effected by the Labor Management Relations Act.

Section 10 (c) of the National Labor Relations Act, as amended, provides "That in determining whether a complaint shall issue alleging a violation of section 8 (a) (1) or section 8 (a) (2), and in deciding such cases, the same regulations and rules of decision shall apply irrespective of whether or not the labor organization affected is affiliated with a labor organization national or international in scope." Section 9 (c) (2) of the Act as amended, provides that "in no case shall the Board deny a labor organization a place on the ballot by reason of an order with respect to such labor organization or its predecessor not issued in conformity with section 10 (c)." The legislative history of these amendments indicates

that their purpose was to require the Board to accord equal treatment to affiliated and nonaffiliated unions in considering charges that such unions are employer-dominated or assisted and in determining the appropriate remedy for eliminating such domination or assistance.[1]

Under the National Labor Relations Act, prior to these amendments, the Board normally ordered an employer to disestablish an unaffiliated labor organization which it found to be employer-dominated.[2] In the case of an affiliated union found to be employer-dominated, the Board normally did not order the offending employer completely and permanently to disestablish it but directed him to cease recognizing it until certified by the Board.[3] The amendments contained in the Labor Management Relations Act do not, of course, preclude the Board from entering dis-

[1] House Report 510, 80th Cong., 1st Sess., pp. 54–55; Senate Report No. 105, 80th Cong., 1st Sess., pp. 12–13.

[2] E. g., *National Labor Relations Board* v. *Falk Corporation*, 308 U. S. 453; *National Labor Relations Board* v. *Southern Bell Telephone and Telegraph Co.*, 319 U. S. 50.

[3] E. g., *Matter of National Motor Bearing Co.*, 5 N. L. R. B. 409, 416–425, 441, enforced as modified, *National Labor Relations Board* v. *National Motor Bearing Co.*, 105 F. (2d) 652 (C. C. A. 9); *Matter of Eagle-Picher Mining & Smelting Co.*, 16 N. L. R. B. 727, 766–775, 831–832, 868–874, enforced as modified, *Eagle-Picher Mining & Smelting Co.* v. *National Labor Relations Board*, 119 F. (2d) 903 (C. C. A. 8); *Matter of Cowell Portland Cement Co.*, 40 N. L. R. B. 652, enforced as modified, *National Labor Relations Board* v. *Cowell Portland Cement Co.*, 148 F. (2d) 237 (C. C. A. 9), certiorari denied, 326 U. S. 735.

establishment orders in the future with respect to labor organizations, whether affiliated or nonaffiliated, found to be employer-dominated or assisted. They only mean that the Board cannot in the future continue to order employers to disestablish unaffiliated labor organizations found to be employer-dominated or supported unless the Board requires similar action on the part of employers with respect to affiliated unions also found to be employer-dominated or supported.

The amendments were clearly aimed only at this disparity of remedies applied by the Board to affiliated and nonaffiliated organizations and not to the nature of the disestablishment remedy. None of the amendments made by Congress and none of the legislative history reveals a Congressional intent to prohibit the Board's use of the disestablishment remedy. The committee reports,[4] as well as Senator Taft's statement and

[4] S. Rep. No. 105, on S. 1126, 80th Cong., 1st Sess., p. 3, in summarizing the major amendments effected by the bill states: "It prevents the Board from continuing to accord affiliated unions special advantages at the expense of independent labor organizations, by requiring that, under identical circumstances, the Board in complaint cases refrain from any disparity of treatment." See also pp. 12–13 of the same report. The Conference Report, H. Rep. No. 510, on H. R. 3020, 80th Cong., 1st Sess., pp. 54–55, states: "In the past the Board has made findings of violation of Section 8 (2) in cases involving independent unions, committees and representation plans upon much weaker evidence than it has required in cases involving affiliated unions, and it has ordered employers to take far more drastic action with respect to independent organizations than with respect to affiliated organizations.

analysis of the bill,[5] emphasize that the only objective of the amendments was to end "disparate treatment" of affiliated and nonaffiliated organizations. Sponsors of the amendments repeatedly denied that their effect would be to weaken the remedies heretofore used by the Board to ban company-dominated unions.[6]

The conference agreement adopts the language of the Senate amendment, which requires equal treatment for both affiliated and nonaffiliated organizations."

[5] Senator Taft stated: "* * * In the opinion of the Senate conferees the language of the Senate amendment which prevents the Board from continuing the present disparity of treatment with respect to independent unions was sufficient to accomplish the result now expressly spelled out by the conference agreement. Since the House conferees expressed some doubt on this question, however, the Senate conferees agreed to the insertion of this language" (Cong. Rec., June 5, 1947, p. 6601).

[6] Senator Ball stated: "All the bill provides is that in considering charges of company domination the N. L. R. B. shall treat independent unions and affiliated unions in exactly the same way. I cannot see that that requires them to put a company-dominated union on the ballot. It merely says they shall treat A. F. L. unions and so-called independent unions in exactly the same way. * * * All the bill, as it came from the committee, says is that in considering unfair-labor-practice charges, under section 8 (a) (2), that the company is dominating the union, they shall treat all unions alike, regardless of whether they are affiliated with an international union or not. If that is requiring the Board to place a company-dominated union on the ballot, I do not understand the English language. I do not think it does that" (93 Cong. Rec. 4030). "All the bill does is to require the N. L. R. B. in considering the charges, under section 8 (a) (1) or (2), of company domination or interference with a union, to treat affiliated and nonaffiliated independent unions exactly the same. If the Senator wants to defend the present practice of having one rule for affiliated unions and a completely

The Board has not had occasion as yet to consider the application and scope of the "equal treatment" provisions. It now has cases pending before it which will necessitate consideration of these provisions. Decisions in these cases will be handed down in the near future, and if this case has not yet been disposed of by the Court, the Board will supply the Court with copies of these decisions as they issue.

Since the amendments to the Act do not preclude the Board from entering the same order in the future as that presented in this case in just the same circumstances as are here present, petitioner's contention that the amendments require a vacation of the decree below is without merit.[7]

2. But even if the amendments did change the law in any respect material to violations of Section 8 (a) (2) and to disestablishment orders, still they

---

different rule for independent unions, then he may do so. But do not try to make the statement that the bill encourages company unions. It leaves the provisions of section 8 (a) (1) and (2) exactly as they are now" (93 Cong. Rec. 4196). Senator Smith stated: "Under the bill, if the union continues to be company-dominated it is not eligible to be placed on the ballot. All we are doing here is to protect independent unions. If they can prove that they are independent unions they are entitled to be placed on the ballot. It is distinctly provided in the bill that if unions are company-dominated they are not eligible" (93 Cong. Rec. 4283).

[7] The stipulation in *National Labor Relations Board* v. *Keystone Steel & Wire Co.*, No. 9, this Term, to which the Company refers (Supp. Br. 5), was entered into by the Board primarily because of factual considerations peculiar to that case and not because of the change made by the amendments.

are not retroactive and would have no effect on the present case. The Labor Management Relations Act was enacted on June 23, 1947, and became effective on August 22, 1947. The Board's orders in Nos. 19 and 20, October Term, 1947, directing the Company to disestablish the two labor organizations were handed down on March 6, 1946, and October 21, 1944, respectively (IEA R. 670–700; ERO R. 1–24).[8] The decrees of the court below enforcing the orders of the Board were entered on December 20, 1946 (ERO R. 486–487; IEA R. 774–777). Thus, prior to the passage or effective date of the Labor Management Relations Act, the Company, by virtue of the National Labor Relations Act, was under an obligation to disestablish the two labor organizations involved here and thereby restore to its employees their freedom to organize for purposes of collective bargaining. The Board's orders and the decrees of the court below enforce this obligation. The passage of the Labor Management Relations Act after this obligation had come into existence cannot serve to absolve the Company of its duty to discharge that obligation. The Federal savings statute provides that the repeal or amendment of any statute shall not have the effect to release or extinguish any penalty, forfeiture, or liability incurred under such statute unless the repealing or

[8] For convenience, references to the record in No. 20 are designated "(ERO R. —)," references to the record in Nos. 19 and 22 are designated "(IEA R. —)."

amending act shall so expressly provide and such statute shall be treated as still remaining in force for the purpose of sustaining any proper action or prosecution for the enforcement of such penalty, forfeiture, or liability. 1 U. S. C. 29. The term "liability" as used in this statute has been broadly construed by this and other courts to comprehend all obligations arising out of any breach of a statutory duty.[9] The obligation of an employer to disestablish an employer-dominated union is, we submit, a "liability" within the meaning of the general savings statute. Hence, under the terms of that statute that obligation continues to be binding upon the Company, notwithstanding the subsequent passage of the Labor Management Relations Act unless Congress had manifested therein an intention to extinguish such liability.[10] The Labor Management Relations Act

[9] E. g. *United States* v. *Reisinger*, 128 U. S. 398; *Hertz* v. *Woodman*, 218 U. S. 205; *United States* v. *U. S. Industrial Alcohol Co.*, 8 F. Supp. 179, 181–183 (D. Md.); *United States* v. *Four Cases of Lastings*, Fed. Cas. No. 15,145 (D. C. S. D. N. Y.); *Tinker* v. *Van Dyke*, Fed. Cas. No. 14,058 (C. C. E. D. Mich.); *Warren* v. *Garber*, Fed. Cas. No. 17,196 (C. C. E. D. Va.); *DeFour* v. *United States*, 260 Fed. 596, 599 (C. C. A. 9); certiorari denied, 253 U. S. 487; *Goublin* v. *United States*, 261 Fed. 5 (C. C. A. 9); *Lang* v. *United States*, 133 Fed. 201 (C. C. A. 7); *United States* v. *Krupnick*, 51 F. Supp. 982, 989 (D. N. J.); *United States* v. *Auerbach*, 68 F. Supp. 776, 778–779 (S. D. Calif.)

[10] See *Great Northern Ry. Co.* v. *United States*, 208 U. S. 452, 465; *United States* v. *Chicago, St. P., M. & O. Ry. Co.*, 151 Fed. 84, 93–94 (D. Minn.), affirmed 162 Fed. 835 (C. C. A. 8), certiorari denied, 212 U. S. 579; *Maceo* v. *United States*, 46 F. (2d) 788, 789 (C. C. A. 5); *Edgmon* v. *United States*, 87 F. (2d) 13 (C. C. A. 10).

contains no provision for relieving an employer from any liability arising out of any unfair labor practices committed prior to the passage of the Labor Management Relations Act. The United States Circuit Court of Appeals for the Eighth Circuit has recently held that the obligation of an employer to remedy unfair labor practices committed prior to the enactment of the amendments to the National Labor Relations Act is a liability preserved by 1 U. S. C. 29, *National Labor Relations Board* v. *National Garment Co.*, decided January 7, 1948.

The authorities cited by the Company (Supp. Br. 8–9) to the effect that "this Court will consider changes in the law occurring while cases are pending on appeal" are not controlling. In the cases cited either there was no general savings statute to preserve liabilities incurred under the original statute or they involved rules governing future conduct. The general savings statute does not apply to orders which do not enforce liabilities but merely lay down rules for future conduct. Here the Company has unlawfully dominated and supported the two labor organizations involved. By reason of that conduct, the Company came under an obligation to take appropriate action repudiating them as the bargaining representative of its employees, wipe the slate clean, and thereby free them from the compulsions flowing from its long-continued domination of their organ-

izational life.[11] Such an obligation, we believe, does not lay down merely a rule for future conduct; it calls for the redress of past unfair labor practices and is, therefore, a liability within the meaning of the savings statute. For these reasons there is no warrant for remanding these cases to the Board as requested by the Company.

3. The Company also argues (Supp. Br. 6–7) that the Labor Management Relations Act broadens the permissible scope of judicial review of Board findings of fact and that the court below should therefore now be directed to reconsider the Board's findings of fact in the instant proceedings and determine the validity of these findings upon the basis of the standard of review laid down in the Labor Management Relations Act. This contention is without merit.

Section 10 (e) and (f) of the National Labor Relations Act provided, *inter alia,* that upon petition to the appropriate circuit court of appeals to enforce or set aside a Board order "the findings of the Board as to the facts, if supported by evidence, shall be conclusive." Sections 10 (e) and (f) of the National Labor Relations Act were amended by the Labor Management Relations Act by substituting for the provision that Board findings "as to facts, if supported by evidence, shall be conclusive" the provision that such find-

---

[11] *National Labor Relations Board* v. *Falk Corp.*, 308 U. S. 453, 459–461; *National Labor Relations Board* v. *Newport News Shipbuilding & Dry Dock Co.*, 308 U. S. 241, 250.

ings "with respect to questions of fact if supported by substantial evidence on the record considered as a whole shall be conclusive." The only court which has thus far explicitly ruled upon the effect of this amendment has held that Congress did not thereby materially change the standard of review. *National Labor Relations Board* v. *Austin Co.*, 21 L. R. R. M. 2132, 2134 (C. C. A. 7, decided December 19, 1947). In that case the court found that, while Congress undoubtedly intended that the scope of judicial review be broadened,[12] the language employed by it "impelled the conclusion that, in effect, the scope of our review under the new Act is only immaterially changed from the scope of our review under the National Labor Relations Act."

In any event, the opinion of the court below shows that it gave full and careful consideration to the whole record in the case (ERO R. 465–485; IEA R. 753–773). Indeed, the court expressly stated that if in the instant case "the crucial issue (i. e., whether the company had taken sufficient steps to disabuse the employees' minds of the belief that in 1944 they were still subject to unlawful employer-domination) had been left to a jury, and if the jury had returned a general verdict against the company, we would not, on the evidence in this record, dream of disturbing the

[12] See Sen. Rep. No. 105, 80th Cong., 1st Sess., note 7, p. 56, and p. 27.

jury's verdict" (ERO R. 479, IEA R. 767). Since the court has already held that the record would sustain a jury verdict, a remand to consider if the record as a whole sustains the Board's findings would be entirely useless procedure.

However, even assuming for purposes of argument that the Labor Management Relations Act establishes a different standard of judicial review of Board orders with respect to the requisite evidentiary support necessary to entitle them to enforcement, such a change cannot affect the validity of a decision made prior to the change in reviewing standards and in conformity with the standards of judicial review operative when the decision was rendered. As already stated, the Labor Management Relations Act became effective by its own terms on August 22, 1947. The opinion of the court below in the instant proceedings was handed down on November 26, 1946 (ERO R. 465–485; IEA R. 753–757). The decrees enforcing the Board's order were entered in the court below on December 20, 1946, or eight months prior to the effective date of the Labor Management Relations Act. The court below applied the standard of judicial review of Board orders set forth in the then operative provisions of the National Labor Relations Act, found that the Board's orders in the instant proceedings were supported by substantial evidence within the meaning of Section 10 (e) and (f) of the National Labor Relations Act, and

accordingly ordered them enforced. It is a general rule that legislative changes with respect to procedural rules or rules of evidence cannot, in the absence of a manifest legislative intent to the contrary, be relied on "to reach backward, and nullify by relation the things already done." *Berkovitz* v. *Arbib & Houlberg, Inc.*, 230 N. Y. 261, 130 N. E. 288, 290. Accord: *Sprague* v. *Ticonic National Bank*, 307 U. S. 161, 169–170; *Salt Lake Coffee & Spice Co.* v. *District Court*, 44 Utah 411, 140 Pac. 666, 668–669; see 2 Sutherland, *Statutory Construction*, § 2212 (3d ed. 1943). See also *Woodvine* v. *Dean*, 194 Mass. 40, 79 N. E. 882, 883; *In re Patterson's Estate*, 155 Cal 626, 102 Pac. 941, 945.[13]

CONCLUSION

The decision of the court below is correct, and entirely in accord with the rulings of this Court. The petitions for certiorari should therefore be denied.[14]

---

[13] Cf. Rule 86 of the Federal Rules of Civil Procedure (28 U. S. C. 723c) which provides that the new rules shall govern "all proceedings in actions brought after they take effect and also all further proceedings in actions then pending, except to the extent that in the opinion of the court their application in a particular action pending when the rules take effect would not be feasible or would work injustice, in which event the former procedure applies." The rule has been construed as requiring that procedural steps taken prior to the effective date of the new Rules be tested under the rules in effect at the time such steps were taken. *Sprague* v. *Ticonic National Bank*, 307 U. S. 161, 169–170; *Hawkinson* v. *Carnell & Bradburn*, 26 F. Supp. 150, (E. D. Pa.); *Dolcater* v. *Manufacturers*

Respectfully submitted.

PHILIP B. PERLMAN,
Solicitor General.

ROBERT N. DENHAM,
General Counsel.

DAVID P. FINDLING,
Associate General Counsel.

RUTH WEYAND,
Acting Assistant General Counsel.

DOMINICK L. MANOLI,
Attorney,
National Labor Relations Board.

JANUARY 1948.

& Traders Trust Co., 25 F. Supp. 637, 640 (W. D. N. Y.).

[14] In its original memorandum, dated February 1947, the Board suggested that, in view of the conflict with *National Labor Relations Board* v. *Keystone Steel & Wire Company, et al.*, which was then pending on certiorari, No. 544, Oct. Term 1946, this Court might deem it appropriate to defer action upon the present petitions pending disposition of the *Keystone* case. In view of the stipulation entered into by the parties in the latter case, and the action of this Court on December 8, 1947, in remanding the case to the Circuit Court of Appeals, there would no longer appear to be any reason for either granting the present petitions or postponing action upon them.

U. S. GOVERNMENT PRINTING OFFICE: 1948